Supreme Court, U.S.
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No. 09-888

In The
Supreme Court of the United States

LELAND GRASKE,

Petitioner,

v.

DANIEL DOYLE AND ANNE DOYLE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Daniel Doyle was ejected from the boat because Leland Graske, the owner and operator of the boat, accelerated the boat when Daniel Doyle was in a position of danger.

The question raised by this Petition is whether Graske's attempt to manipulate the judicial system, by successfully invoking admiralty jurisdiction and then taking the opposite position when he does not like the results, will be rewarded by this Court.

The other question is whether this Court will review the facts, and address the lower courts' findings that Leland Graske failed to exercise reasonable care.

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CITATIONS TO OPINIONS BELOW

In addition to the two opinions cited by Graske, the district court's denial of Defendant's Motion to Amend Findings of Fact and Conclusions of Law, or for a new trial, is also relevant to the issues herein. *Doyle v. Graske*, 2008 W.L. 3539269 (D. Neb. 2008) (Pet. App. 59-67).

STATEMENT OF THE CASE

Graske's recitation of the facts is incomplete. Without engaging in a lengthy discussion of the facts and conclusions of the trial court, here are a few of the facts and findings that Graske neglected to mention:

1) The court found that it was most likely that Daniel Doyle was seated on the tube of the boat. Pet. App. 47. Graske acknowledges that he was negligent if he accelerated the boat with Doyle seated on the tube. Pet. App. 7.

2) The court found that Graske was negligent because he accelerated when Doyle was not holding on to a strap. Pet. App. 6-9, 47-49. This finding has nothing to do with notice, or acting as an insurer.

3) There is a difference between "maximum performance", and safe operation. A boat operator's primary obligation is safety, not performance. Pet. App. 6-9, 35-38, 47-50.

4) Graske neglects to mention that he was the party that invoked admiralty jurisdiction as the basis for removal. Pet. App. 2.

BRIEF IN OPPOSITION

Graske is pursuing a novel litigation strategy. The Doyles originally filed this action in state court, but Graske removed the case to federal court and *Graske* invoked admiralty jurisdiction. Pet. App. 2. After the district court ruled in the Doyles' favor, and after the court of appeals affirmed the judgment, Graske, unhappy with the results, switched tactics.

The issue of admiralty jurisdiction was raised, for the first time, in the Petition for Rehearing before the court of appeals. This position is particularly strange because it was Graske who invoked admiralty jurisdiction in the first place. Asserting one position, and then changing positions when things do not go your way, is a tactic that has never been countenanced by this Court. See, e.g., *Davis v. Wakelee,* 156 U.S. 680 at 689, 15 S.Ct. 555 (1895); *New Hampshire v. Maine,* 532 U.S. 742, at 749, 121 S.Ct. 1808 (2001). This is not the case for this Court to change course, and say that it is acceptable for litigants to engage in this type of gamesmanship.

Graske also asserts that the lower courts are divided on the issue of whether admiralty jurisdiction extends to torts occurring in navigable waters of other countries. However, the best Graske can do is

cite three outlier district court decisions, and he has found no conflict among the courts of appeals. While Graske calls on this Court to resolve this illusory conflict, Graske fails to muster any meaningful analysis of why the decisions of the lower courts in this case were wrong. Invoking admiralty jurisdiction in this case is consistent with several decisions of this Court, prominent treatises on the subject, and decisions from several courts of appeals.

Graske's second question – whether notice of a danger is a prerequisite for imposing liability on a boat operator – spans only two and a half pages, and is likewise not worthy of this Court's review. The lower courts applied the correct standard of care. Thus, this question is nothing more than a factbound question where two courts have reached the same conclusion. Review of such a fact-specific decision is not warranted.

ARGUMENT

I. Graske's Jurisdictional Argument Violates The Doctrine Of Judicial Estoppel.

Graske argues that the district court did not have admiralty jurisdiction in this case. Pet. 5-10. However, Graske specifically invoked that jurisdiction before the district court, Pet. App. 2, and he did not raise the issue until his Petition for Rehearing in the court of appeals. Resp. App. 1-3. While jurisdictional

claims can be brought at any time, this tactic should not be rewarded by this Court.

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U.S. 680, at 689, 15 S.Ct. 555 (1895).

This Court has recognized that the purpose of judicial estoppel is "to protect the integrity of the judicial process," by creating a mechanism "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine,* 532 U.S. 742, at 749-750, 121 S.Ct. 1808 (2001) (citing *Edwards v. Aetna Life Ins. Co.,* 690 F.2d 595, at 598 (6th Cir. 1982); and *United States v. McCaskey,* 9 F.3d 368, at 378 (5th Cir. 1993)).

It is undisputed that Graske removed this case from state to federal court invoking admiralty jurisdiction. It is also undisputed that the district court accepted Graske's argument that it possessed admiralty jurisdiction. Having the Doyles litigate the case through trial and appeal, only to have Graske question the very jurisdiction he invoked in the first place, is manifestly unfair. Such a result would amount to a perversion of the judicial process. Graske, raising this question when he previously invoked admiralty jurisdiction, is far different than a

court or other party raising the issue at this stage. The doctrine of judicial estoppel counsels against this Court's review of this issue at this late stage.

II. Three District Court Decisions Are Not Worthy Of This Court's Review.

Graske's argument is based on two fallacies:

1) That admiralty jurisdiction applies only to those torts occurring on the navigable waters of the United States, and

2) That there is a significant conflict regarding admiralty jurisdiction for torts occurring outside the territorial waters of the United States.

This Court has never held that admiralty jurisdiction over torts is limited to U.S. territorial waters. Also, while there may be some rogue district court decisions, there is no conflict among the circuit courts.

Graske acknowledges that the alleged conflict exists only among district courts. Pet. 6. In fact, Graske cannot offer one decision originating from a court of appeals holding that admiralty jurisdiction does not apply to torts occurring in the territorial waters of another country.

It is a well-known practice of this Court to decline certiorari review of a question presenting a conflict between federal district courts. See Gressman, E., et al., *Supreme Court Practice*, at p. 256 (9th ed. 2007). This practice is especially apt

here where the division among the district courts is the result of rogue decisions which have not extended into the circuits.

Graske can find only three district courts that have ruled that admiralty jurisdiction is not proper where a tort is committed in the territorial waters of another country. See, e.g., *Dunham v. Hotelera Canco S.A. de C.V.*, 933 F. Supp. 543 (E.D. Va. 1996); *St. Pierre v. Maingot*, 2002 WL 31655355 (E.D. La. 2002); *Sharma v. Skaarup Ship Management Corp.*, 699 F. Supp. 440 (S.D.N.Y. 1988). Given that admiralty jurisdiction was established the same time as the formation of our Constitution, and given that in the last 200 plus years of admiralty jurisdiction there are only three district court decisions, the better characterization is that those decisions are outliers. They do not represent a true conflict among lower courts.

III. The District Court Possessed Admiralty Jurisdiction Over This Tort.

To support his argument that admiralty jurisdiction is limited to the navigable waters of the United States, Graske cites three district court cases that rely on a quote from this Court's decision in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 92 S.Ct. 418 (1971). However, in order to make that argument, Graske, just like the district courts before him, ignores the rest of the opinion in *Victory Carriers*. They ignore the quote from Justice Story that

admiralty jurisdiction extends to " . . . the high seas, or on waters within the ebb and flow of the tide." They also ignore all of the cases cited by this Court at 404 U.S. 205, n.2.

If they had reviewed those cases, they would have found this Court's decision in *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 17 S.Ct. 572 (1897) wherein this Court held that admiralty jurisdiction extends to torts that occur in foreign waters:

> There is no difficulty about the jurisdiction of a court of admiralty in this case. . . .
>
> The fact that the cause of action arose in the waters of a foreign port is immaterial. While in some cases it is said that a court of admiralty had jurisdiction of all torts arising upon the high seas, or upon the navigable waters of the United States . . . the connection in which those words are found indicate that they were not used restrictively; and the law is entirely well settled both in England and in this country that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court. . . .

Id. at 166 U.S. 284-285. See also, *The Eagle*, 75 U.S. 15 (1868); *United States v. Flores*, 289 U.S. 137, 53 S.Ct. 580 (1933); Gilmore and Black, *The Law of Admiralty*, 33 (2d ed. 1975).

The circuit courts that have considered this issue have agreed with this Court and the Eighth Circuit that admiralty jurisdiction applies to cases involving

torts that occur in the waters of another country. There is no conflict among the courts of appeals.

As recognized by Graske, the Third Circuit agrees that admiralty jurisdiction extends to torts that occur in foreign waters. *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166 (3rd Cir. 1995); *Malaysia Intern. Shipping Corp. v. Sinochem Intern. Co. Ltd.*, 436 F.3d 349 (3rd Cir. 2006) (rev'd on other grounds, 549 U.S. 422 (2001)). It is of passing interest that in *Sinochem Intern. Co. Ltd.*, while this Court only considered the *forum non conveniens* issue, it expressed no concerns regarding the district court's and Third Circuit's conclusion that admiralty subject matter jurisdiction existed.

In *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995) the court held that admiralty jurisdiction extends to a tort that occurred in the territorial waters of the United Arab Emirates. Likewise, in *Roberts v. United States*, 498 F.2d 520 (9th Cir. 1974), the Ninth Circuit found that a general maritime claim could be pursued when the tort occurred in Japanese territorial waters.

While jurisdictional questions can be raised at any time, the fact that this issue was not raised until the eleventh hour reveals the weakness of Graske's argument. See *Clinton v. City of New York*, 524 U.S. 417, at 428, 118 S.Ct. 2091 (1998) ("The fact that the argument did not previously occur to the able lawyers for the Government does, however, confirm our view . . . ").

Contrary to Graske's assertion, this Court extends admiralty jurisdiction to cases arising in the waters of other countries. The Third, Fifth, Eighth, and Ninth Circuits all follow this Court's decisions. However, Graske has not cited any circuit court decision to the contrary. There are no conflicts between the courts of appeals, nor is the decision of the Eighth Circuit in conflict with any of this Court's decisions. Thus, there are no "compelling reasons" that support granting this Petition. See Sup. Ct. Rule 10. Graske's Petition for Writ of Certiorari should be denied.

IV. Graske's Reasonable Care Question Does Not Merit Review.

Graske's second question is simply an attempt to retry the facts in this Court. It is telling that Graske devoted only two and a half pages to this "issue". This question cannot even pretend to be worthy of this Court's review.

Both the trial court and the court of appeals applied the reasonable or ordinary standards of care that Graske argues are applicable in this case. Pet. App. 6, 43-45. While Graske does not like the outcome, this is a case where the correct rules of law were applied, and the decisions were supported by the evidence. Thus, this is an issue that does not merit this Court's time or review. See Sup. Ct. Rule 10.

CONCLUSION

Graske's strategy of invoking admiralty jurisdiction, but then questioning it when the courts rule against him, should not be rewarded by this Court. It has long been recognized that admiralty jurisdiction extends to torts that occur in the waters off the coast of a foreign country. Furthermore, both the trial court and the court of appeals applied the correct legal standards to arrive at their decisions. Thus, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DANIEL DOYLE AND ANNE DOYLE, Plaintiffs/Appellees, v. LELAND GRASKE, Defendant/Appellant.	Case No. 08-3144 **APPELLANT'S DESIGNATION AND STATEMENT OF ISSUES** (Filed Sep. 26, 2008)

COMES NOW the Appellant, Leland Graske ("Graske"), and designates his statement of issues as follows:

1. Whether the trial court erred in finding that Graske did not exercise reasonable care for the safety of Doyle;

2. Whether the trial court erred in finding that the bow seat of the boat is a position of danger for a passenger while the boat is accelerated up to plane on the open ocean;

3. Whether the trial court erred in finding that Graske knew or should have known that Doyle was in a position of danger in the bow seat while the boat was accelerated up to plane on the open ocean;

4. Whether the trial court erred in finding that, even if Doyle was in the bow seat when the accident occurred, then Graske was negligent in continuing to accelerate the boat while knowing that Doyle was not holding the hand straps;

5. Whether the trial court erred in finding that the sudden mechanical failure caused by the negligence of Kirk Marine and its mechanic were foreseeable to Graske;

6. Whether the trial court erred in finding that the negligence of Graske was a proximate cause of Doyle's injuries;

7. Whether the trial court erred in concluding that Graske had a higher duty of care for Doyle's safety than did Doyle himself;

8. Whether the trial court erred in allocating only 10% of the total causal fault for Plaintiffs' damages to Daniel Doyle;

9. Whether damages for loss of consortium are recoverable in a maritime action; and

10. Whether, even if recoverable, the trial court erred in failing to reduce the loss-of-consortium damages of Anne Doyle by Daniel Doyle's percentage of causal fault.

Dated this 26th day of September, 2008.

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Defendant/Appellant

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